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IN THE SUPREME COURT OF THE UNITED STATES

MIDLAND CENTRAL APPRAISAL DISTRICT,
Petitioner,

v.

BP AMERICA PRODUCTION CO., *ET AL*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the United States

BRIEF OF *AMICUS CURIAE* DALLAS CENTRAL APPRAISAL DISTRICT IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* DALLAS CENTRAL APPRAISAL DISTRICT IN SUPPORT OF PETITIONERS

The Dallas Central Appraisal District (DCAD) respectfully submits this brief in support of the Petitioner Midland Central Appraisal District (MCAD).[1]

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief

Counsel of record of all parties received notice at least ten (10) days prior to the due date of the *amicus curiae's* intention to file this brief and the parties have consented to the filing of this brief

STATEMENT OF INTEREST

The Dallas Central Appraisal District (DCAD) is joined in the filing of this brief by the Tax Appraisal District of Bell County, the Bexar Appraisal District, the Brazoria County Appraisal District, the Collin Central Appraisal District, the Denton Central Appraisal District, The Ector County Appraisal District the Ellis Appraisal District, the Fort Bend Central Appraisal District, the Galveston Central Appraisal District, the Grayson Central Appraisal District, the Harris County Appraisal District, the Central Appraisal District of Johnson County, the McLennan County Appraisal District, the Parker County Appraisal District, the Potter-Randall Appraisal District, the Tarrant Appraisal District, the Central Appraisal District of Taylor County, the Wichita Appraisal District, and the Williamson Central Appraisal District.

These appraisal districts have a direct interest in this case. Many of the districts contain properties that will be affected by the outcome of this decision and ask the court to clarify the Texas state court jurisprudence so that they can efficiently, fairly, and effectively appraise the property in their jurisdiction. The following is a list of members and districts that have properties within their jurisdiction that contain stored natural gas, the tax assessment of which will be directly affected by the outcome of this case. While the effect of this case on these districts is not all inclusive of the effect on taxing districts in Texas, the number of entities affected allows this Court to

fully understand that this decision is critically important to taxation in Texas and thus is of national importance.

The outcome of this case will also have an effect on the taxation of personal property located within these districts beyond just the natural gas storage industry. The Harris County Appraisal District, Fort Bend Central Appraisal District, Brazoria County Appraisal District, and the Waller County Appraisal District all have salt dome storage facilities that are maintained on properties within their jurisdiction in a manner factually similar to the gas storage facilities at issue in the case. Smith County Appraisal District has salt dome storage facilities and also oil tank farms that are maintained on properties within its jurisdiction in a manner factually similar to the gas storage facilities at issue in the case. The approximate value of the oil stored in the tank farms in Smith County is $65,000,000. Fort Bend County has salt dome storage properties that are maintained and factually similar to the gas storage facilities at issue in the case. Waller County has salt dome storage properties that are maintained and factually similar to the gas storage facilities at issue in the case.

The Tarrant Appraisal District has a multitude of gas and oil pipelines located within its jurisdiction that this decision may affect such as, but not limited to, the Atmos Energy Mid/Tex Pipeline, ExxonMobil Pipeline, Sunoco Pipeline, Texas Midstream Gas Services, Western Production, and the XTO Energy pipeline.

STATEMENT OF THE CASE

The Dallas Central Appraisal District (DCAD) adopts and incorporates herein the Statement of the Case, The Statement of Facts, the Statement of Jurisdiction and the Issue Presented set forth in the Petitioner's Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

This Honorable Court should grant the Petition for Writ of Certiorari and rule on the merits of this matter so that all Texas appraisal districts will have a clear and uniform method to properly and accurately appraise natural gas being stored within their jurisdictions.

ARGUMENT

I. CONFLICTING JURISPRUDENCE IN STATE COURTS CREATES CONFUSION FOR TAX ASSESSORS AND TAXPAYERS ALIKE AND MUST BE RESOLVED IN ORDER FOR TAXATION TO BE FAIR AND UNIFORM NATIONWIDE.

The *ad valorem* taxation of oil in federally regulated storage facilities within the interstate transportation system presents a recurring issue that merits this Court's attention. The issue of taxing oil that is stored in one state and then transported to other states is a matter of nationwide concern and the clarity of the jurisprudence related to the same is of particular importance to Texas

appraisal districts and taxing authorities nationwide who are statutorily charged with the obligation of taxing all non-exempt property in their respective state.

In Mississippi, the Mississippi Supreme Court found, seemingly in conflict with this case, that a sufficient nexus existed to support taxation, overruling a Commerce Clause challenge regarding petroleum products in tanks in Mississippi which arrived by state pipeline, stayed for less than five days, and were injected into other pipelines for distribution in and out of the state. *Mississippi State Tax Commission v. Murphy Oil USA, Inc.*, 933 So.2d 285 (Miss. 2006).

In Louisiana, the jurisprudence on issues similar to the instant case relies on the archaic, pre-*Complete Auto* law, and Louisiana courts have held that gas that had come to rest in Louisiana resulting in hydrocarbons in a holding facility was taxable in Louisiana. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), *United Gas Pipe Line Co. v. Whitman*, 390 So.2d 913 (La. Ct. App. 1980), *writ denied.*, 396 So.2d 928 (La. 1981) and *Miss. River. Transmission Co. v. Simonton*, 442 So.2d 764 (La. Ct. App. 1983), *writ denied*, 444 So.2d 1240 (La. 1984).

In Florida, the courts found that petroleum products which were brought from out of state were subject to local *ad valorem* taxation under the Commerce Clause holding that nexus existed under the *Complete Auto* analysis notwithstanding that the goods were "in transit" in interstate commerce. *Havill v. Gurley*, 382 So.2d 109 (Fla. Dist. Ct. App. 1980).

The Kansas Supreme Court, on similar but not identical facts, held that non-Kansas companies' allocations of gas storage were exempt from local *ad valorem* taxation. *See In the Matter of the Appeal of the Director of Prop. Valuation*, 284 Kan. 592, 161 P.3d 755 (2007).

Because there is a multitude of underground oil storage facilities located in various locations and counties across Texas and nationwide, every appraisal district or nationwide taxing authority with a storage facility or the potential to have a facility constructed in the future within its jurisdiction has a vested interest in the outcome of this litigation.

Unless this Court rules on the merits of this case and clarifies or overturns the Texas state jurisprudence on the matter, which specifically conflicts with Oklahoma state jurisprudence and the Solicitor General's opinion on the same (which this Court declined to grant Certiorari to correct), there is a possibility that a multiplicity of additional litigation will be necessary to settle all the remaining factual issues that may distinguish each appraisal district's or taxpayer's specific factual scenario.

Further, a resolution of this issue on a federal level would greatly further judicial economy and prevent costly and prolonged litigation. For example, if a taxpayer happens to have a brick and mortar building in the county where the storage facility resides, the appraisal district or the taxpayer may be forced to sue to determine if the substantial nexus test is met under those circumstances. There is no doubt that fewer lawsuits will be filed

concerning the taxation of oil in Texas and other states if the Court grants the Petition for Writ of Certiorari and rules on the merits.

As a result of the Texas Supreme Court's decision to decline the Petition for Review of the Texas Court of Appeals, it can be argued that Texas appraisal districts are prohibited from taxing working oil that is stored in storage tanks in their districts while taxing authorities in Oklahoma faced with the prospect of taxing the exact same facility are required to tax the same. This uneven application of the law governing application of taxation of products in interstate commerce is not acceptable as a matter of public policy. These unacceptable consequences can only be remedied by this Court. The state by state consequences if this Writ is not granted are vast and expansive.

If the Texas and Oklahoma Supreme Courts' differing and contradictory holdings are allowed to stand, misguided but good faith attempts by both taxing authorities and taxpayers alike will be forthcoming with a possibility of more state Supreme Court decisions forthcoming.

The dichotomy in available approaches to local taxing authorities would mean that if the wrong authority for taxation was used, the entity would be in violation of the U.S. Constitution and result in needless expenditures of costs and resources to pursue taxation or defend the failure to tax property that is subject to taxation. Thus, this Court should grant Petitioner's Writ of Certiorari, review this case, and provide guidance for the uniform imposition of taxes on this commodity moving in interstate commerce.

II. THERE ARE TWO CASES ON WHICH PETITIONS FOR WRIT HAVE BEEN FILED ON THESE RELATED ISSUES, THUS SHOWING HOW IMPORTANT THESE ISSUES ARE AND PROVIDING A UNIQUE OPPORTUNITY FOR THIS COURT TO CLARIFY JURISPRUDENCE ON THIS SUBJECT.

On the same day that Midland Central Appraisal District filed the Petition for Writ of Certiorari in this matter, the Harrison Central Appraisal District filed Petition for Writ of Certiorari in *The Peoples Gas, Light, and Coke Co. v. Harrison Central Appraisal District,* 270 S.W.3d 208 (Tex. App.–Texarkana 2008, pet. denied). The facts of these cases are similar in that they both deal with storage of oil or gas in holding tanks associated with pipelines from the same.

In the *Harrison* case, the Texas Court of Appeals held that a generally applicable, non-discriminatory *ad valorem* tax on an inventory of natural gas violated the dormant Commerce Clause. The taxation issue in the *Harrison* case is essentially the same as in the case at bar; however, the *Harrison* case deals with natural gas inventory and the instant case deals with stored oil. On facts substantially similar to the *Midland* and *Harrison* cases, the Oklahoma Supreme Court concluded that a generally applicable, non-discriminatory *ad valorem* tax on inventory was constitutional.

Having two related Petitions for Writ of Certiorari presents an opportunity for the Court to better clarify this rule than any single petition is likely to permit. By taking this set of petitions, the Court can draw any appropriate distinctions

between oil "tank farms" like that in the *Midland* case and the gas storage facilities in the *Harrison* case. This Court should not pass up the best opportunity this Court will have to speak on these issues.

When this issue was brought to the attention of this Court in *In re Assessment of Personal Property Taxes Against Missouri Gas Energy*, 234 P.3d 938 (Okla. 2008), *cert. denied*, 130 S. Ct. 1685 (2010), this Court sought the input of the United States Solicitor General who agreed with the Oklahoma Supreme Court's Ruling.

The fact that two cases are pending before this Court at this time reiterates the importance of resolving the dichotomy of state Supreme Court opinions which can only be resolved by this Court granting the Petitions for Writ of Certiorari in both this case and in the *The Peoples Gas, Light, and Coke Co. v. Harrison Central Appraisal District*, 270 S.W.3d 208 (Tex. App.–Texarkana 2008, pet. denied) case.

III. DCAD AGREES WITH PETITIONER THAT THE TEXAS APPELLATE COURT'S DECISION IS ERRONEOUS.

DCAD adopts the totality of Petitioner's Petition for Writ of Certiorari herein in lieu of rebriefing the same issues. However, the DCAD specifically points out that it concurs that the Court of Appeals erred in three ways.

First, the Court of Appeals erred in using this Court's "Continuity of Transit" analysis to eclipse

the *Complete Auto* Analysis. The correct approach for this Court to adopt is outlined fully by the Oklahoma Supreme Court in *Missouri Gas,* which held that Petitioner failed to establish the unconstitutionality of applying Oklahoma's *ad valorem* tax on personal property to stored natural gas. The Solicitor General agreed with this holding.

Second, the Court of Appeals erred in applying *Quill's* "Physical-Presence" rule to *ad valorem* property taxation because the *Quill* case is narrow and should be limited to sales and use taxes which are clearly and wholly distinguishable from the taxes at hand. *Quill Corp. v. North Dakota*, 540 U.S. 298 (1992).

Finally, the Court of Appeals simply applied the *Complete Auto* test to the facts at hand incorrectly and should have found that, under the facts presented, the *Complete Auto* Test is completely and wholly satisfied. It is clear that the tax in question is fairly apportioned, since it only applies to gas that is actually in the storage tanks in Harrison County at the assessment date of January 1. The gas cannot be in two places at once on January 1 and thus cannot be subject to double taxation. Furthermore, the tax plainly does not discriminate against interstate commerce, as it applies to any and all inventories. The gas also has nexus with the state because the property is actually physically present in the State on the assessment date. This Court has found sufficient nexus by the nature of the presence of the property being taxed. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). Finally, and most clearly, the tax in question is patently fairly related to the services

provided by the state. It is clear that local law enforcement and other government services would be required if there was a natural or manmade disaster at the storage facilities and it is counterintuitive to argue otherwise.

This incorrect jurisprudence will have a haunting effect on taxation in Texas and perhaps nationwide. Specifically this case, as well as the *Midland* case, creates a dangerous principle that a state cannot impose property taxes without showing a nexus to some business activity. This mistake in and of itself will wreak havoc on the appraisal district which seeks to fairly and legally assess *ad valorem* taxes upon property in its jurisdiction. Secondly, these decisions make it almost impossible for an appraisal district to pass the *Complete Auto* test as modified by these rulings because under these decisions if a property is in commerce, then it lacks the nexus and thus fails the first prong of the test.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully request that this Court grant the Petition for Writ of Certiorari in this action.

Respectfully submitted,

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